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No. 89-1683

In The

Supreme Court of the United States

October Term, 1989

WATER POWER COMPANY, INC., ET AL.

Petitioners,

v.

PACIFICORP, ET AL.

Respondents.

On Petition For A Writ Of Certiorari
To The Oregon Court Of Appeals

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The defect in the decision below, which misconstrues the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 ("PURPA") to require a utility merely to *offer* to purchase power, is far graver than simple error. If allowed to stand, the decision will block PURPA's goal of increasing the nation's energy independence, thereby damming the tremendous reservoir of untapped domestic energy that PURPA was enacted to unlock.[1] The strained arguments in respondent's opposition brief reflect the difficulty of defending the lower court's attack on PURPA, which legislatively overrides utility resistance to purchasing power from decentralized sources.

A. Respondent's Statement Of The Case Belies Its Resistance To Purchasing Petitioners' Power

Utilities prior to PURPA were unwilling to purchase excess electrical power from small power producers.[2] PURPA forcibly modified the utilities' recalcitrant behavior, but could not change their attitude. Although respondent's statement of the case suggests a congenial exercise

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[1] OPEC's new agreement to limit production and Iraq's recent invasion of Kuwait lend special urgency to the Court's safeguarding American development of alternative energy.

[2] *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 470 U.S. 1075, 1076 (1985) (White, J., dissenting from dismissal of appeal) ("[PURPA] is designed to promote the development of alternative energy resources by overcoming the historical reluctance of electric utilities to purchase power from nontraditional facilities.").

in 1982-83 in which respondent was "exploring the proposed project," (Resp. Br. at 2), and examining its "fluctuat[ing]" avoided costs to determine the price to be paid, in reality respondent had to be dragged kicking and screaming into the project. Tr. IV, 656.[3] Respondent's avoided costs filings in fact were made annually, and were applicable to anyone who had begun negotiations in 1982, as had petitioners. The Oregon Public Utilities Commission ("PUC") regulations so provided, and the PUC so reminded respondent in late 1983. Contemporaneously, respondent's staff generated a memorandum outlining various ways to "kill" PURPA projects. Tr. VIII, 1186-87.[4]

Respondent's insistence on Cottage Grove as the principal point of delivery (Resp. Br. at 3) was the blunt

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[3] Respondent's blithe assertion that "the parties voluntarily entered into a contract" (Resp. Br. at 5) is patently false. Petitioners were constrained repeatedly to enlist the assistance of state regulators to overcome respondent's resistance. *E.g.*, Tr. IV, 631-32.

[4] Respondent's statement of the case is misleading in other respects. For example, the statement that the PUC required petitioners to identify "a plan" for transmitting the power to respondent's system (Resp. Br. at 3) insinuates that petitioners had no idea what kind of project they wanted to build. Substantial engineering already had been done, however, and construction contracts were under way. Tr. II, 363, 382-87, 411-12. The "plan" actually was a reference to the specific engineering design for wheeling the power from one system to another, from Douglas Electric Cooperative ("Douglas"), to Bonneville Power Administration ("Bonneville"), to respondent. That would have to be done whether the point of delivery was Cottage Grove or Fairview.

instrument used for killing petitioners' project. After petitioners had agreed to accept Cottage Grove, respondent attempted to insert Fairview as an alternate point of delivery. Tr. VI, 964-65. Eventually, the PUC approved naming Fairview as an alternate point of delivery. Tr. IV, 723-24. As respondent knew (but petitioners did not), Bonneville was not happy with either Cottage Grove or Fairview. Nevertheless, Bonneville had swallowed its principles and went along with Cottage Grove. Then respondent continued to pick a fight with Bonneville by insisting on Fairview too, knowingly subjecting petitioners to this intramural fight between respondent and Bonneville. Tr. IX, 1352-54. Although Bonneville ultimately acceded to Fairview too in its final draft transmission agreement, respondent still refused to take yes for an answer and quashed the project. Tr. VIIA, 88.

Respondent's quotation from the power purchase agreement (Resp. Br. at 4) (referring to "such other location as may reasonably be required by [respondent] to allow [respondent] to accept Net Delivered Output from [Bonneville]") suggests that respondent had essentially unfettered discretion to determine the point of delivery where it might receive Net Delivered Output. The context, of course, established simply that if there were a physical, engineering requirement that respondent accept the power at a point of delivery other than Cottage Grove, then the project sponsors would need to accommodate that requirement. Respondent had no such physical requirement. Tr. V, 911-12.

B. Respondent's Argument Recasts PURPA As A Paper Tiger

Relying on an out-of-context regulation as its sole supporting authority, respondent posits a two-tiered statutory scheme for PURPA. Resp. Br. at 6. At the first tier (pre-contract), qualifying facilities such as petitioners' fall within the protective mantle of PURPA, and may benefit from congressional intention to promote development of small power production. At the second tier (post-contract), qualifying facilities are adrift at sea, and may obtain no assistance from PURPA's policies and protections.

Respondent's claim that *Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 734 P.2d 1366, *rev. den.*, 303 Or. 591, 739 P.2d 571 (1987), "illustrated the [pre- and post-contract] distinction" is nonsense. Resp. Br. at 10. To begin with, respondent does not dispute that the parties were subject to PURPA's regulatory scheme, including PUC intercession, even *subsequent* to the signing of the contract. Moreover, the *Snow Mountain* court held that PURPA (to promote energy development) prohibits a utility from engaging in dilatory negotiations with a qualifying facility to avoid entering into a contract. 734 P.2d at 600. *A fortiori* under *Snow Mountain*, once having entered into a PURPA-mandated contract, a utility is prohibited from avoiding it by a contractual dodge.[5]

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[5] Notwithstanding its protestations to the contrary (Resp. Br. at 11), respondent was successful in avoiding its obligation to purchase under both PURPA and the contract. The court below refused to throw petitioners an available force majeure

(Continued on following page)

Respondent relies on 18 C.F.R. § 292.301(b), which neither expressly nor impliedly creates a two-tiered statutory structure. Rather, that regulation permits a utility and qualifying facility to negotiate rates, terms, and conditions different from what would otherwise be required within the context of *"any purchase." Id.* (Emphasis added). PURPA and its regulations must be read as a whole, and the mandate of PURPA is to encourage small power production, whether pre- or post-contract. 16 U.S.C. § 824a-3. Respondent's tortured reading of 18 C.F.R. § 292.301(b) ignores FERC's recognition that a qualifying facility's ability to negotiate different rates, or terms and conditions, under that section is *"buttressed* by the . . . rights and protections of these rules." 45 Fed. Reg. 12217 (emphasis added).

Respondent's citation of *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 470 U.S. 1075 (1985), as additional authority for its novel statutory construction is misplaced. In that case, Justice White sought to address the question whether a state can require utilities to pay more than full avoided costs "for their *mandatory* purchases," and unequivocally observed that "FERC *requires* utilities to purchase electricity from qualifying facilities." 470 U.S. at 1076 (emphasis added).

(Continued from previous page)

life preserver to rescue that purchase obligation, despite the provision therefor in Article XVII of the power purchase agreement. App. 6a to Petition. As a result, petitioners had no opportunity to be excused from third party conduct beyond their control, behind which respondent hid to evade its purchase obligation.

Respondent's reference to "freedom to contract" (Resp. Br. at 6) as the reason why the parties entered into a power purchase agreement is the sheerest hypocrisy. To begin with, the term appears nowhere in PURPA or its implementing regulations. Further, respondent misconstrues the term. "Freedom of contract" is a constitutional liberty protected by the due process clauses of the fifth and fourteenth amendments. It embraces the right to enter freely into all lawful contracts, but it is not an unlimited right. *See Highland v. Russell Car & Snow Plow Company*, 279 U.S. 253, 261 (1929) ("such liberty is not absolute or universal and . . . Congress may regulate the making *and performance* of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created") (emphasis added). Paradoxically for respondent, PURPA is a prime example of a significant limitation on respondent's "freedom of contract." By lawfully requiring respondent to purchase power from petitioners, Congress restricted, rather than preserved, respondent's contractual freedom.[6]

Respondent defends the Oregon Court of Appeals' decision on the ground that it simply sanctions a contractual modification of the obligation to purchase power. Respondent attempts a nice distinction, but in this case

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[6] Respondent misstates that the "only" basis for petitioners' claim to 1982 rates is the terms and conditions of the power purchase agreement. Resp. Br. at 6-7. Petitioners qualify for 1982 rates because they began negotiating in 1982 and the PUC accordingly required respondent to make those rates available to petitioners. Tr. II, 405. Those were the rates that invited petitioners' attention and made reasonable their engineering work.

modification is tantamount to evisceration. The purchase *obligation* was set in PURPA. 16 U.S.C. § 824a-3. FERC rules implement the purchase obligation. 18 C.F.R. § 292.303(a). The *manner* in which the obligation may be performed, however, is set forth in the terms and conditions of the contract. If the result of the application of terms and conditions in a contract is to frustrate a purchase obligation, then that is more than a "contract modification" and forbidden by PURPA. 45 Fed. Reg. 12219 (1980) (the obligation to purchase supersedes contractual restrictions).

Like most litigated PURPA disputes, the controversy below surrounded negotiation on rates.[7] The Oregon Court of Appeals discussed respondent's purchase obligation in the context of a rate dispute. App. 4a to Petition n.3. Read fairly, the Court of Appeals held contrary to PURPA that there is no purchase obligation, just a requirement to offer to purchase. That requires review, not only for its obvious error but also for its substantial importance.

If respondent is permitted to hide behind the contract, which shifts the mechanics of interconnection to a decision by a third party, Bonneville, respondent avoids its duty to interconnect with petitioners, in violation of

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[7] If the state public utilities commission sets a specific rate, and it is not below what FERC mandates, then that state administrative decision cannot be defied by the parties, on their rate negotiations. Otherwise, however, the parties are free to negotiate rates, presumably upwards. *Cf.* 45 Fed. Reg. 12221 ("[T]he States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies.").

American Paper Institute, Inc. v. American Elec. Power Service Corp., 461 U.S. 402 (1983). In that case the Court unmistakably confirmed a utility's duty to interconnect to accomplish purchases or sales of electricity authorized by PURPA. *Id.* at 419-20. The decision below, to the contrary, however, invites purchasing utilities to engage in dilatory squabbling with a third party, rather than working to resolve the interconnection with a qualifying facility. PURPA's implementing regulations and the decisions of this Court prohibit such a result.

CONCLUSION

The extraordinary scenario of respondent evading its federal purchase obligation and thumbing its nose at PURPA will become all too ordinary an occurrence absent Supreme Court review. For the reasons set forth herein and in petitioners' opening brief, the Court should grant this petition for certiorari.

Respectfully submitted,

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